

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

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UNITED STATES OF AMERICA, ex rel.,  
and FLFMC, LLC

Plaintiffs,

v.

ACE HARDWARE CORPORATION

Defendant.

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) No. 10-cv-00229 (AJS)  
)  
) Hon. Arthur J. Schwab  
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**ACE’S MOTION TO RECONSIDER ITS RULE 12(b)(1)  
MOTION TO DISMISS FOR LACK OF STANDING**

Defendant Ace Hardware Corporation (“Ace”) respectfully requests that the Court dismiss Plaintiff FLFMC, LLC’s Complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(1) because FLFMC, LLC (“FLFMC”) has not established Article III standing to bring this suit. In support of its motion, Ace submits the accompanying Memorandum In Support and states as follows:

1. Ace has been accused of violating the false patent marking statute, 35 U.S.C. § 292(a), by marking certain of its products with expired patent numbers.

2. On April 16, 2010, Ace moved to dismiss this case pursuant to Rule 12(b)(1) on the grounds that FLFMC could not demonstrate standing. (Docket Nos. 16 & 17.) On May 7, 2010 the Court denied Ace’s motion with respect to standing. (Docket No. 25.)

3. On August 3, 2010, in *United States of America ex rel. FLFMC, LLC v. Wham-O Inc.*, No. 10-cv-435, this Court issued a Memorandum Opinion (Docket No. 28) and Order (Docket No. 29) holding that FLFMC, LLC, the plaintiff in *Wham-O* and in this case, did

not have Article III standing to pursue its *qui tam* action pursuant to 35 U.S.C. § 292, and that this Court therefore lacked subject matter jurisdiction. The Court granted Wham-O's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and dismissed that case with prejudice.

4. That same day, the Court entered an Order in this case stating that, in light of its decision in the *Wham-O* case, and in the interests of consistency and equal application of the law, the Court would revisit and reconsider the standing issue upon motion and briefs of the parties. (Docket No. 32.)

5. Ace asks the Court to reconsider its prior denial of Ace's motion to dismiss based upon standing. In a complaint virtually identical to that in *Wham-O*, FLFMC does not allege any concrete injury-in-fact to any party; the only injury it alleges is the sovereign injury caused by the alleged false marking. Allegations of a sovereign injury cannot create standing, because the government cannot assign this type of injury to a private party by virtue of a *qui tam* statute.

6. Even if the government could assign its sovereign injury to another, FLFMC must plead a concrete injury-in-fact to itself, to the United States, or to the public, sufficient to establish that FLFMC has standing to seek federal jurisdiction in the first instance.

7. Because FLFMC never alleged any harm or injury whatsoever to any party, FLFMC has failed to establish standing and its Complaint must be dismissed.

**WHEREFORE**, for the foregoing reasons and those set forth in its Memorandum In Support, Defendant Ace Hardware Corporation respectfully requests that the Court dismiss Plaintiff FLFMC, LLC's Complaint in its entirety with prejudice, and grant such other and further relief the Court deems necessary under the circumstances.

Dated: August 18, 2010

Respectfully submitted,

/s/ Jessica K. Fender

Matthew T. Logue

Arthur H. Stroyd

DEL SOLE CAVANAUGH STROYD LLC

200 First Avenue, Suite 300

Pittsburgh, PA 15222

Tel: (412) 261-2393

Fax: (412) 261-2110

John A. Bannon (jbannon@schiffhardin.com)

Jessica K. Fender (jfender@schiffhardin.com)

SCHIFF HARDIN LLP

233 South Wacker Drive, Suite 6600

Chicago, Illinois 60606

Tel: (312) 258-5500

Fax: (312) 258-5600

*Counsel for Defendant*

Ace Hardware Corporation

